IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6067

BILLY DUREN,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Missouri (en banc) is reported at 556 S.W. 2d 11 (Mo. 1977), and appears as Appendix A to the Petition for a Writ of Certiorari herein.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered September 27, 1977. A timely petition for rehearing was denied October 11, 1977. The petition for a writ of certiorari was filed January 19, 1978, and certiorari was granted May 1, 1978. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether Missouri's jury selection system, which exempts "any woman" solely on the basis of her sex, denies to criminal defendants their sixth and fourteenth amendment right to a jury drawn from a panel fairly reflecting the community's population?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth and fourteenth amendments to the Constitution of the United States, and the following Missouri provisions:

Mo. Const. Art. I, § 22(b): No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

Mo. Rev. Stat. § 494.031 (Supp. 1975), in pertinent part: The following

persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit: . . . (2) Any woman who requests exemption before being sworn as a juror; . . . .

STATEMENT OF THE CASE

On March 31, 1976, petitioner Duren was found guilty of first degree murder and assault with intent to kill by a Jackson County, Missouri all-male jury. Judgment of conviction and sentences were entered April 21, 1976. Prior to trial, on February 4, 1976, Duren filed a timely motion to quash the petit jury panel on the ground that, in violation of the Federal Constitution's fair cross-section requirement, females were systematically eliminated by virtue of Missouri's automatic exemption for "any woman." At the hearing on the motion, it was established, without dispute, that potential jurors in Jackson County, Missouri are randomly selected from voter registration lists, and that persons so selected are sent questionnaires to determine their eligibility for jury service.[1] The questionnaire prominently states:

> TO WOMEN:
>
> The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects

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[1] See Mo. Rev. Stat. § 497.130 (Supp. 1975); State v. Parker, 462 S.W.2d 737, 738 (Mo. 1971).

not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

Signature

Returned questionnaires showing no exemption were placed in the jury wheel. Evidence was received showing 29.1% women in the wheel in 1976.[2] Each week, jury panels were summoned on a random basis from the wheel. For the periods June through October 1975, and January through March 1976, 26.7% of the persons summoned for jury duty were women (2992 of 11,197). In March 1976, 29.5% of those summoned (453 of 1537) were women.

The summons to prospective jurors included this conspicuous notice:

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[2]Questionnaires were sent to 70,000 persons on the county voter registration list. From the returned questionnaires, a master list was compiled containing 30,000 names. 556 S.W.2d at 16. Voter registration in Missouri, as in the United States generally, is not significantly higher for men than it is for women. See Bureau of the Census, Current Population Reports: Voting and Registration in the Election of November 1976 (March 1978)(in Missouri, 71.1% of the men, 69.9% of the women; in the United States, 67.1% of the men, 66.4% of the women).

> Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible. Def. Trial Ex. No. 2, App. at ____.

According to the undisputed testimony of Jury Commissioner John Fitzgerald, if a woman failed to respond to the summons, she was deemed to have exercised her option not to serve. Def. Trial Ex. No. 4, App. at ____.

For the months just prior to the petitioner Duren's trial, those appearing in response to a jury summons included 15.9% women in June 1975, 15.1% in July 1975, 13% in August 1975, 13.7% in September 1975, 10.9% in October 1975, 12.3% in January 1976, 17.6% in February 1976. At the time of trial, March 1976, 15.5% of those appearing (110 of 707) were women. The average for the period was 14.5% women (741 of 5119). Petitioner Duren's panel of fifty-three included five women (9.4%); his jury of twelve was all male. 556 S.W.2d at 16.

In dramatic contrast, in the federal district court serving the same territory, and despite the availability of a childcare excuse for mothers who lack adequate domestic assistance, women accounted for 53% of the persons on the master list, and 39.8% of the actual jurors. 556 S.W.2d at 24 (dissenting opinion).

1970 Jackson County census figures showed a population of approximately 407,000 inhabitants over 21 years of age, with 54% women and 46% men. 556 S.W.2d at 15.

Despite the uncontested showing of a female population constituting 54% of the relevant community, a population dwindling to less than 30% of those summoned to serve on juries, and to 14.5% of those appearing for jury service, the motion to quash was denied. On appeal to the Missouri Supreme Court on federal constitutional grounds, that disposition was sustained on the merits.

The Missouri Supreme Court held that the state's jury selection system, which exempts every woman for the asking simply because she is a woman, survives this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975), and is fully consistent with sixth and fourteenth amendment limitations.

Taylor v. Louisiana, the Missouri Supreme Court acknowledged, compelled recognition that (1) petitioner Duren, a man, has standing to challenge exclusion of women from his jury, (2) the sixth amendment requires selection of petit juries from a representative cross-section of the community, (3) if women are systemically eliminated in the selection process, the sixth amendment cross-section requirement cannot be satisfied. 419 U.S. at 526, 528-33. Nonetheless, the court below ruled that the overt gender classification employed in Missouri, which inevitably yields jury panels overwhelmingly male, must be presumed constitutional. 556 S.W.2d at 15. Petitioner Duren demonstrated constant male representation on jury panels in the neighborhood of 85%, but that was not high enough, the Missouri court concluded. To overcome the presumption, Duren would have to show women were effectively excluded.

556 S.W.2d at 16-17.

The Missouri opinion offers no coherent explanation for the determination that a 6:1 male/female ratio fairly represents a local population that includes at least as many women as men. Disregarding this Court's clear instruction that "the right to a proper jury" -- one drawn from a panel reasonably "representative of the community" -- "cannot be overcome on merely rational grounds," 419 U.S. at 534, 538, the court below articulated no justification at all for Missouri's wholesale exemption of women solely on the basis of their sex. That court simply took refuge in the notion that opting out was a "female privilege."

When Taylor v. Louisiana was decided, five states (Alabama, Georgia, New York, Rhode Island, Tennessee), in addition to Missouri, allowed any woman to opt out of jury service. Currently, only Missouri and Tennessee retain an automatic exemption for every woman.[3]

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[3]Compare Tenn. Code Ann. § 22-101 (1955), with Ala. Code Tit. 30, § 21 (1959)(replaced by Ala. Code § 12-16-43 (1975)); Ga. Code Ann. § 59-112(6)(d)(Supp. 1974)(repealed by 1975 Ga. Laws, pp. 779, 780); N.Y. Jud. Law §§ 507(7), 599(7), 665(7)(McKinney 1940)(repealed by 1975 N.Y. Laws, c. 4); R.I. Gen. Laws Ann. § 9-9-11 (1969)(repealed by 1975 R.I. Pub. Laws c. 233, § 1).

Summary of Argument

I.

In Taylor v. Louisiana, 419 U.S. 522 (1975), this Court confirmed that the sixth amendment requires selection of jurors from a fair cross-section of the population. Under Missouri law, however, women but not men are permitted to "opt out" of jury service. As a result, men outnumber women on the panels from which jurors are selected by approximately six to one. This gross imbalance assures that juries will not be reasonably representative of the communities from which they are drawn. Missouri's automatic exemption for "any woman" therefore violates petitioner's rights under the sixth and fourteenth amendments to the Constitution.

II.

Traditionally, states justified women's exemptions by assuming that most women would be too busy with home and children to serve on juries, and that it would be more convenient to exempt all women than to determine which are actually unable to serve. This Court has recognized that such "archaic and overbroad" assumptions are no longer tenable. Women now constitute a substantial part of the paid labor force; only "habit," not "analysis or actual reflection," can account for the notion that women are occupied day-round in pursuits that exclude jury duty. The "convenience" of adhering to an obsolete habit of thought does not justify erosion of a

criminal defendant's sixth and fourteenth amendment rights.

Jury service is a basic responsibility of citizenship, a principal form of participation in the democratic processes of government. By giving "any woman" an automatic exemption, thus treating men's service as essential, women's as expendable, Missouri reinforces ancient prejudices harmful to women, to the jury system, and to the community at large.

ARGUMENT

I.

MO. CONST. ART. I, § 22(b), AND MO. REV. STAT. § 494.031, WHICH AUTOMATICALLY EXEMPT "ANY WOMAN" FROM JURY DUTY, DESTROY THE POSSIBILITY OF A JURY REPRESENTATIVE OF THE COMMUNITY, THEREBY DEPRIVING ALL CRIMINAL DEFENDANTS OF A FUNDAMENTAL RIGHT SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

In Jackson County, Missouri, as in most places, in the population eligible for jury service, women outnumber men.[4] But

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[4]Petitioner Duren submitted to the trial court, in February 1976, 1970 Jackson County census figures showing approximately 407,000 county inhabitants over 21 years of age, with 54% women and 46% (footnote continued)

in the panels from which jurors are drawn, Jackson County men dominate. Their share is eighty-five percent, or approximately six men to one woman. 556 S.W.2d at 23 (dissenting opinion). This stark disparity is not the result of happenstance. Rather, Missouri invites and achieves women's substantial underrepresentation. By Constitution and statute, publicized in the official notice and questionnaire and in the summons for jury duty, Missouri tells women their sex excuses them from service. The women's excuse is not tied to any hardship, incapacity or occupation. Based on sex per se, it bears no relationship to an individual's life situation or to the objectives of jury service. The issue here presented is whether this purposeful, solely sex-based differentiation violates the sixth amendment requirement that juries be drawn from a fair cross-section of the community's population.[5]

(footnote continued)
men. 556 S.W.2d at 15. The Missouri Supreme Court's view that census figures were inappropriate indicators of the relevant population, id. at 16, is inexplicable in light of this Court's opinion in Alexander v. Louisiana, 405 U.S. 625, 627, 629-30 (1972)(relying on 1960 census figures to establish the population presumptively eligible for jury service in a case in which prosecution commenced in September 1967), and Taylor v. Louisiana, 419 U.S. 522, 531 (1975)(relying on demographic figure of 53%).

[5]Duncan v. Louisiana, 391 U.S. 145, 149 (1968), recognized as "fundamental to the American scheme of justice" sixth amendment trial by jury in criminal cases, and declared such trial a right guaranteed to
(footnote continued)

It is petitioner's position that Missouri's scheme, by design and in operation, is impossible to reconcile with "[t]he [constitutional] principle of the representative jury." Peters v. Kiff, 407 U.S. 493, 500 n.9 (1972). Just as an exemption for "any man,""any Jew,""any black," would yield a skewed jury list, so Missouri's exemption for "any woman" means a roster not "truly representative of the community." See Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

In Taylor v. Louisiana, 419 U.S. 530, the Court confirmed "the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment." It ruled that the day had passed when the cross-section requirement encompassed men, but drew in women, if at all, only in token numbers. Fair representation of the local population of men and women is the only sensible reading of the Taylor decision. Interpretation of Taylor to accommodate marked curtailment in women's representation through automatic exemption trivializes the cross-section requirement and this Court's reasoned elaboration of it.

(footnote continued)
defendants in state courts by the fourteenth amendment. Essential to the jury trial guaranteed by the sixth amendment, the Court explained in Williams v. Florida, 399 U.S. 78, 100 (1970), is a selection system assuring a "fair possibility for obtaining a representative cross-section."

For comprehensive analysis, see Daughtrey, Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana, 43 Tenn. L. Rev. 1 (1975).

See Daughtrey, Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana, 43 Tenn. L. Rev. 1, 68-82 (1975).

Petitioner Duren established below "the progressive decimation of potential [female] jurors." Alexander v. Louisiana, 405 U.S. 625, 630 (1972). The reduction pattern, dropping in two steps from 54% of the total population to under 30%, and finally to 14.5%, bears a marked resemblance to the cuts in prospective black jurors shown in Alexander v. Louisiana, 405 U.S. at 629-30. The result, underrepresentation of women on juries by 73%, surely a greater disparity than in a legion of cases in which underrepresentation of a cognizable group was held significant. E.g., Turner v. Fouche, 396 U.S. 346 (1970)(38% underrepresentation); United States v. Butera, 420 F.2d 564, 571 (1st Cir. 1970)(36% women in jury pool, compared to 52% in population; 30% underrepresentation constitutes prima facie case of illegal discrimination).[6]

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[6]Under Missouri's scheme, a defendant is far more likely to be tried by an all-male jury, and thus to be deprived of "a flavor, a distinct quality [which] is lost if either sex is excluded." Ballard v. United States, 329 U.S. 187, 194 (1946). If Missouri women were represented on Jackson County jury panels proportionately to their presence in the population, the chance of randomly drawing an all-male jury would be roughly one in 11,000. With women making up only 14.5% of the jury panels, however, the chance of drawing an all-male jury is greater than one in seven.

Moreover, as in Alexander, the statistics do not stand alone. 405 U.S. at 630. For the selection process in Missouri is distinctly non-neutral. At least at two crucial steps, when the official notice and questionnaire are dispatched, and when the summons issues, bare gender classification separates those whose service is deemed necessary from those whose participation the state declares expendable.[7] In significant contrast to Jackson County, Missouri's 14.5% figure, in places where women are not specifically exempt, their participation on juries is at least evenly matched with men's. See Daughtrey, supra, 43 Tenn. L. Rev. at 75 n.312 and authorities cited therein.

In sum, Missouri's opt out system for all females, providing a jury pool "truly representative of the community's men," but severely underrepresentative of the community's women, misses the essence

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[7]Nor does Missouri make any attempt to develop and pursue special procedures to encourage women to regard their service, like men's, as essential to the fair, effective administration of justice. Indeed, if a woman fails to respond to the summons, she is deemed to have opted out, and no further inquiry is made. Def. Trial Ex. No. 4, App. at ___. As to the state's affirmative obligation, ignored in Jackson County, Missouri, to provide a representative cross section, see Broadway v. Culpepper, 439 F.2d 1253, 1259 (5th Cir. 1971); Brooks v. Beto, 366 F.2d 1, 12-13 (5th Cir. 1966), cert. denied, 386 U.S. 975 (1967).

of "[t]he principle of the representative jury." Peters v. Kiff, 407 U.S. at 500 n.9. As restated in Taylor, the "broad representative character" of jury panels is a bedrock sixth amendment requirement "partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." 419 U.S. at 530-31, quoting from Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946)(Frankfurter, J. dissenting). To make that diffusion and sharing possible, neither man nor woman may be exempt solely on the basis of sex.[8]

Finally, even independent of the sixth amendment, a state cannot, consistent with due process, subject a defendant to trial by a jury selected in an arbitrary and discriminatory manner. Peters v. Kiff, supra.[9] This Court's precedent makes it

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[8]Making exemption for women voluntary does not insulate the state from responsibility for the marked imbalance. Most persons of either sex will escape a time-consuming civic task, given the opportunity. "Neither man nor woman can be expected to volunteer for jury service." Alexander v. Louisiana, 405 U.S. 625, 643 (1972)(Douglas, J. concurring), citing L. Kanowitz, Women and the Law 30 (1969). See Daughtrey, supra note 5, 43 Tenn. L. Rev. at 74, 75-76 n.314 (citing commentary on phenomenon of jury service avoidance).

[9]Nor need a defendant show that the arbitrary feature of the system occasioned harm to him. For the impact of an infirm selection mechanism -- one that drops out a substantial and identifiable class (footnote continued)

apparent that rules of inclusion or exemption pigeonholing people overbroadly by gender are indeed arbitrary and discriminatory. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977).

Thus, Missouri's blatantly sex-based jury service exemption, almost the last of the genre in the nation,[10] harks back to

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(footnote continued)
of citizens eligible for jury duty -- on "any individual trial is unascertainable," "too subtle and too pervasive to admit of confinement to particular issues or particular cases." Peters v. Kiff, 407 U.S. 493, 497, 498, 503 (1972). For studies indicating women jurors may be more sympathetic to criminal defendants, see R. Simon, The Jury and the Defense of Insanity 109 (1967); H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment 12 (1968).

[10]See note 3 supra. Before the Court decided Taylor, Louisiana had eliminated its "women's exemption," and had substituted for it a sex-neutral rule stating juries are to be "selected at random from a fair cross-section of the parish." The Louisiana rule effective since 1975 further provides that "all qualified citizens . . . shall have an obligation to serve as jurors when summoned," and "no citizen shall be excluded . . . on account of race, color, religion, sex, national origin or economic status." La. Sup. Ct. Rules XXV, § 1 (1975). The wording is similar to that of the Uniform Jury Selection and Service Act, which is premised on the theory that (footnote continued)

"one of the most dramatic cases of . . . myopia in the entire development of American law." Daughtrey, supra, 43 Tenn. L. Rev. at 50. On its face and in operation, Missouri's automatic opt out provision for "any woman" cannot survive reasoned constitutional review. The invitation to each and every woman to avoid jury duty on whim or caprice is obviously incapable of administration without regard to sex, and it inevitably produces jury panels that do not represent a fair cross-section of the community.

II.

NO TENABLE JUSTIFICATION EXISTS FOR MISSOURI'S INVITATION TO "ANY WOMAN" TO AVOID JURY SERVICE: IF IT WAS EVER THE CASE THAT WOMEN WERE SO SITUATED THAT NONE OF THEM SHOULD BE REQUIRED TO SERVE, THAT TIME HAS LONG SINCE PASSED.

Not a single viable state interest was advanced by the Missouri court for maintaining a jury selection system that invites all women to opt out.[11] Prior to this

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(footnote continued)
"actual service on the jury should be shared as widely as possible," and therefore contains no automatic exemptions. Uniform Jury Selection Service Act (U.L.A.) §§ 1,2,10,11 & Commissioners' Comments to § 11. See also 28 U.S.C. §§ 1861-62 (1970).

[11] The invitation is repeatedly extended. See 556 S.W.2d at 24 (dissenting opinion). Silence is deemed acceptance. See note supra.

Court's decision in Taylor v. Louisiana, it was routine to justify exempting all women based on their presumed role in the home, and the administrative convenience of dealing with women in lump fashion.[12] But Taylor squarely rejected those two habitual responses. As to the first, the Court declared: "If it was ever the case that women . . . were so situated that none of them should be required to perform jury service, that time has long since passed" (emphasis supplied). 419 U.S. at 537. As to the second, the Court ruled: "[T]he administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials." Id. at 535.

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[12] See, e.g., State v. Parker, 462 S.W.2d 737 (Mo. 1971); Leighton v. Goodman, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970), and other decisions cited in Appendix to Appellees' Motion to Affirm at 13-16, Edwards v. Healy, 421 U.S. 772 (1975).

Even prior to Taylor, however, the federal courts and the vast majority of the states administered jury service statutes and regulations with no automatic exemption for women. See Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, published in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970); Alexander v. Louisiana, 405 U.S. 625, 639-40 n.8 (1972)(Douglas, J. concurring); Brief for Appellees at 20 n.*, Edwards v. Healy, 421 U.S. 772 (1975);
(footnote continued)

Taylor was brushed aside by the court below on the ground that the former Louisiana system called upon women to opt in, while Missouri invites them to opt out. But whether the system is opt in or opt out,[13] a state exempting all women plainly does maintain "none of them should be required to perform jury service." And "the administrative convenience in dealing with women as a class" remains, in the opt out variant as in the opt in version, the basis "for diluting the quality of community judgment represented by the jury in criminal trials." In short, the Missouri Court's attempt to distinguish Taylor cannot withstand reasoned analysis.[14]

(footnote continued)
Comment, Twelve Good Persons and True: Healy v. Edwards and Taylor v. Louisiana, 9 Harv. C.R.-C.L. L. Rev. 561 (1974).

[13]New York had an "opt out" system similar to Missouri's, N.Y. Jud. Law §§ 507(7), 599(7), 665(7) (McKinney 1940), which the legislature hastened to repeal after the Taylor decision. 1975 N.Y. Laws, c.4. As the Governor explained, "[w]hile there are some minor differences between the Louisiana statute and the New York women's exemption they are basically similar and there is virtually no doubt that provisions of the Judiciary Law repealed by the bill will eventually be declared unconstitutional under the Taylor decision." Governor's Memorandum, Approval of Bills, 1975 N.Y. Sess. Laws at 1731 (McKinney). See People v. Moss, 80 Misc. 2d 633, 366 N.Y.S. 2d 522 (Sup. Ct. 1975).

[14]See Daughtrey, supra note 5.
(footnote continued)

Significantly, the Missouri court did not even essay the once standard argument, that women should be exempt because they are (or should be) occupied day round tending the hearth. On the contrary, in an ironic twist, that court suggested women's substantial labor force participation[15] as a reason for their severaly limited numbers on jury panels. It conjectured

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(footnote continued)
Taylor reiterates the leeway states have to provide "reasonable exemptions," 419 U.S. at 534, 538, but underscores that there is nothing reasonable about an exemption based solely on womanhood: "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties." Id. at 534-35 (emphasis in original).

[15]Cf. Taylor v. Louisiana, 419 U.S. at 535 n.17. As of June 1977, 56.1% of all women between the ages of twenty and sixty-four were in the paid labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings, Table A-3 (July 1977). In March 1977, 46.4% of women with children under the age of eighteen were in the paid labor force, including 58.3% of those with children between the ages of six and seventeen, 48.9% of those with children between three and five, and 35.1% of those with children under three. Women constituted 41.1% of the total labor force. Hayghe, Marital and Family Characteristics of Workers, March 1977, Tables 1 & 3, Monthly Labor Review, Bureau of Labor Statistics, U.S. Dep't of Labor (Feb. 1978). And whether they are gainfully employed or not, women do not necessarily have heavy duties in the home; as of March 1976, 46.3% of all families had
(footnote continued)

that many of them qualified for, and therefore would seek, other exemptions, as government workers or teachers, for example. 556 S.W.2d at 16. But as Judge Seiler's dissenting opinion points out, 556 S.W.2d at 24, experience in the federal district court serviving the same territory demonstrates the conjecture is fanciful.

Although occupational classes excused are virtually identical in the two court systems, and despite a childcare excuse for women in the federal plan,[16] female jurors turn up in federal court in impressive numbers: women account for 53% of the persons on the master wheel, and 39.8% of the actual jurors. In short, it appears that occupational exemptions would not explain, even in small measure, the gross male/female imbalance Missouri state court jury panel figures reveal.

The sole rationale offered by the Missouri court, that the exemption is a "female privilege," is at best misguided. As Judge Seiler's dissenting opinion emphasizes, 556 S.W.2d at 23, the right at stake is the criminal defendant's. That right -- to a jury drawn from a panel fairly

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(footnote continued)
no children under the age of eighteen. Bureau of the Census, Current Population Reports, Household and Family Characteristics: March 1976, Table 6 (Series P-20, No. 311, Aug. 1977).

[16]Excuse is provided, on request, for a woman charged with responsibility for care of a minor child without adequate domestic help. See 556 S.W.2d at 24 n.4 (dissenting opinion).

representative of the local population -- is safeguarded by making jury service a statutory duty, a "crucial citizen responsibilit[y]." Broadway v. Culpepper, 439 F.2d 1253, 1258 (5th Cir. 1971). But Missouri dilutes the quality of defendant's right, it eliminates the possibility of a jury genuinely reflecting the community's composition, by effectively assuring that men's participation will overwhelm women's.

Not only did the Missouri court fail to scrutinize the supposed favor to females from the perspective of the criminal defendant's right, it also ignored the historic roots and contemporary impact of the vaunted "women's privilege." By 1977, only a court wearing blinders could shut from sight the reality that "statutes exempting women from jury service . . . reflect the historical male prejudice against female participation in activities outside the family circle." Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 718 (1971).[17] Jury service is acclaimed as "one of the basic rights and obligations of citizenship," "a form of participation in the process of government." Penn v. Eubanks, 360 F. Supp. 699, 702 (M.D. Ala. 1973). "[S]ervice on a jury is of material aid to men and women who have that experience. It gives them an insight into the administration of our judicial system and tends to increase their confidence in the administration of justice."

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[17]As late as 1968, the Missouri Supreme Court held constitutional total exclusion of women from juries. See 556 S.W.2d at 13 n.3.

Letter by Chief Justice Leland Carr of the Michigan Supreme Court, reprinted in W. Hart, Long Live the American Jury 19 (1964). A scheme that treats men's service as essential, women's as expendable hardly assists female citizens to view themselves and be viewed by others as full-fledged participants in community affairs. Rather, the arrangement reinforces the stereotype that government is not a woman's business. In failing to recognize adult females as persons with full civic responsibilities as well as rights, Missouri betrays a view of women ultimately harmful to them. Cf. Alexander v. Louisiana, 405 U.S. 625, 639-42 (1972)(concurring opinion).[18]

In sum, Missouri's notion of "female privilege," the state's invitation to every woman to avoid jury duty by self-exemption, defeats the federal constitutional objective of a representative cross-sectional jury and serves no countervailing state interest.

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[18]Cf. Daughtrey, supra note 5, 43 Tenn. L. Rev. at 50 (reporting a Tennessee legislator's response to Taylor: "We don't know what the Court said and don't really care. I don't want my wife and daughter to hear testimony in criminal court."). Similarly indicative of the image of women protected by automatic exemption, and the insidious impact of such "favors" thrust on women, are De Kosenko v. Brandt, 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (1970)(litigant who sought women on her jury told not to complain to the court, challenging automatic exemption of females, but to address her lament to her sisters who prefer "television soap operas, (footnote continued)

"It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable"[19] to type women as persons whose assistance in the administration of justice is not really needed by the community. "That kind of automatic reflex,"[20] noblesse oblige toward the sex long assumed to rate second,[21] perpetuates "a view of American womanhood offensive to the ethos of [contemporary] society." United States v. Dege, 364 U.S. 51, 53 (1960). Exemption of women from civic responsibility, not on the basis of what they do but who they are, signals their "inferior legal status without regard to [their] actual capabilities," Frontiero v. Richardson, 411 U.S. 677, 687 (1973), and stigmatizes all women, even those who do not wish to participate in community affairs. Cf. Peters v. Kiff, 407 U.S. 493, 499 (1972).

(footnote continued)
bridge and canasta, the beauty parlor and shopping" to jury service), and Goldblatt v. Board of Education, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), aff'd, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (1968) (exclusion of compensation for female teachers who serve on juries, while male teachers receive full salary less jury fees, is "reasonable" because men must serve, but women can avoid jury duty for the asking). See generally Ginsburg, Gender and the Constitution, 44 U. Cin. L. Rev. 1 (1975).

[19]Califano v. Goldfarb, 430 U.S. 199, 222-23 (1977)(Stevens, J., concurring).

[20]Id.

[21]See generally S. deBeauvoir, Second Sex (1949); E. Janeway, Man's World, Woman's Place (1971); W. Chafe, The American Woman (1972).

The convenience of inviting women to opt out simply because they were born female was not relied upon by the Missouri court, nor is that rationale tenable after Taylor[22] and in light of experience in the federal courts and the vast majority of state courts where no "women's privilege" is retained. And surely Missouri's adherence to an "archaic and overbroad generalization about women" cannot be disguised as "compensation for past discrimination." See Califano v. Webster, 430 U.S. 313, 317 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975). For labeling a woman's service expendable hardly redresses "our society's longstanding disparate treatment of women." Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977). Any jury service excuse required by some women because of work responsibilities at home or in the marketplace can be preserved, as it is in federal court and most states, by provisions utilizing functional classifications (i.e., hardship and occupational exemptions) rather than womanhood as the basis for exemption.[23]

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[22]See also Califano v. Goldfarb, 430 U.S. 199, 217 (1977)(rejecting the argument that gender is an appropriate substitute for functional classification whenever sex typing "save[s] the Government time, money and effort").

[23]The notion that women do not hold jobs from which absence is manageable ignores, inter alia, that home burdens, as well as burdens of employment outside the home, are increasingly shared by men and women, that many women do not perform the mother-wife role, that many who do perform that role have ample assistance at home. Indeed, when no sex specific (footnote continued)

Unnourished by sense, but reflecting "the role-typing society has long imposed" upon women, Stanton v. Stanton, 421 U.S. 7, 15 (1975), Missouri's automatic exemption for every woman insures perpetuation of unrepresentative juries, and thereby conditions for the administration of criminal justice inconsistent with the sixth and fourteenth amendments. The scheme established by Mo. Const. Art. I, § 22(b), and Mo. Rev. Stat. § 494.031(2)(Supp. 1975), injures "the jury system," "the law as an institution," "the community at large," and "the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

(footnote continued)
exemption is provided, women appear less inclined than men to avoid jury duty. See Daughtrey, supra note 5, 43 Tenn. L. Rev. at 75 n.312.

CONCLUSION

For the reasons stated above, the decision below should be reversed, and the jury service exemption for "any woman" mandated by Mo. Const. Art. I, § 22(b), and Mo. Rev. Stat. § 494.031(2) should be declared unconstitutional.

Respectfully submitted.

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